Supreme Court, U.S.
FILED

00 821 SEP 18 2000

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

ROBERT S. TUTMAN,

Petitioner,

v.

WBBM-TV, Inc./CBS, Inc.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT S. TUTMAN, *pro se*
1600 South Union
Chicago, Illinois 60616
(312) 738-2121

53pp

QUESTION PRESENTED

"The primary objective of Title VII is . . . to avoid the harm in the first place". *Fall v. Indiana University Board of Trustees*, 12 F. Supp. 2d 870, 881 (N.D. Ind.1998), *citing Faragher v. City of Boca Raton*, 524 U.S. 75, 118 S.Ct. 2275, 2292 (1998). Yet, the lower courts in this case ignored genuine issues of materials fact, thus, precluding Petitioner from having his day in court before a jury of his peers on his employment discrimination claims.

The question presented is whether the lower courts failed to apply the proper standard established by this Court (by a preponderance of the evidence in the light most favorable to the non-movant), when they gave no weight to the genuine issues of material fact presented by petitioner on the issues of "reasonable" remediation and "unreasonable" refusal to accept respondent's accommodation in this employment discrimination case.

TABLE OF CONTENTS

Page

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

STATEMENT ON JURISDICTION 1

STATUTORY PROVISION INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 5

CONCLUSION 6

TABLE OF APPENDICES

Appendix A – Opinion of the United States Court of Appeals for the Seventh Circuit dated and decided April 20, 2000 ..... App. 1

Appendix B – Judgment of the United States Court of Appeals for the Seventh Circuit dated April 20, 2000 ..... App. 14

Appendix C – Judgment in A Civil Case dated April 29, 1999 ..... App. 15

Appendix D – Order of the United States District Court for the Northern District of Illinois, Eastern Division, dated April 29, 1999, including Report and Recommendation of the Magistrate Judge of the United States District Court for the Northern District of Illinois, Eastern Division, dated March 30, 1999 ..... App. 16

TABLE OF AUTHORITIES

Page

CASES

Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 118 S.Ct. 2257 (1998) 6

Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275 (1998) 6

Reynolds v. CXS Transportation, Inc., 115 F.3d 850 (11th Cir. 1997), *judgment vacated*, 524 U.S. 947, 118 S.Ct. 2364 (1998) 6

STATUTES

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000e 2, 5

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The Magistrate's Report and Recommendations (per Magistrate Judge Morton Denlow) recommending the grant of respondent's summary judgment motion (Appendix D, Pet. App., App. 17-43) is unpublished. The district court's subsequent order (per Bucklo, D.J.), adopting the Magistrate's Report and Recommendation (Appendix D, Pet. App., App. 16-43), is published at 54 F. Supp.2d 817. The court of appeal's opinion (per Kanne, J.J., joined by Manion and Rovner, J.J.) affirming (Appendix A, Pet. App. 1-13) is published at 209 F.3d 1044.

STATEMENT ON JURISDICTION

The court of appeals entered its opinion and order on April 20, 2000. After applying for and receiving extensions of time, petitioner *pro se* filed a Petition for Writ of Certiorari on September 21, 2000. That Petition was deemed non-compliant with this Court's rules on Certiorari Petitions, and so the Clerk of this Court returned ten of the eleven copies of the filed petition, with instructions to correct its deficiencies by no later than November

21, 2000. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This is a Title VII action, brought under 42 U.S.C. § 2000e.

STATEMENT OF THE CASE

Petitioner is African-American and was a senior CBS Network News sports cameraman, with 25 years of experience when he was terminated by CBS. He was also union steward at the WBBM-TV affiliate of CBS in Chicago, Illinois, past president of the Chicago chapter of the National Association of Black Journalists and a member of the broadcast task force for the National Association of Black Journalists.

On May 19, 1995, merely a few weeks after the bombing of the Federal Building in Oklahoma City, petitioner was chatting with one of WBBM-TV's sportscasters, Tim Weigel, in the WBBM-TV sports office in Chicago. Suddenly, Robert Vasilopulos, petitioner's sports-assignment supervisor, came into the room and said, "get the fuck out of my office before I pop a cap in your ass."[1] Vasilopulos also referred to a movie, which he called

[1] The terms, "pop a cap" or "bust a cap", mean "to shoot" in gang parlance.

Niggers with Hats.[2] Vasilopulos then proceeded to prance around the office, derisively imitating a drunk African-American, and repeating the phrase, "nigger wid a hat, muva fucker, pop a cap in your ass, pop a cap in your ass". Other undisputed evidence established that Vasilopulos had been reprimanded for racial harassment, with letters sent to his personnel file, prior to and around the same time as the incident involving petitioner.

Although Vasilopulos claimed that "it was simply a joke," petitioner perceived the words spoken and the behavior of Vasilopulos as a death threat. So did CBS. Other CBS representatives interviewed Vasilopulos and advised him that they were taking the incident "very seriously".

On the day of the incident, petitioner left the WBBM-TV/CBS premises immediately after reporting the incident to Vasilopulos' supervisor. He returned the next day only to speak with higher management about the incident. CBS then gave petitioner "medical leave."

After a short investigation, CBS merely wrote a reprimand letter to Vasilopulos (the third reprimand letter from management to Vasilopulos), required him to attend sensitivity training (the first of which he refused to attend, because the first trainer was African-American, and the second of which he managed to leave early) and demanded that he make a written apology to petitioner (which apology was just a self-serving account of what happened on May 19, 1995, addressed "to whom it may concern").

---

[2] The actual title of the movie is *Fear of a Black Hat*.

Even the Magistrate Judge interpreted this evidence as sufficiently material to survive summary judgment on petitioner's hostile-environment claim and enough to send the case to a jury. Petitioner had made a *prima facie* case of hostile work environment. Notwithstanding those findings, however, the Magistrate Judge recommended dismissal of petitioner's entire case on summary judgment; the District Court Judge adopted the Magistrate's recommendation for dismissal; and the Circuit Court of Appeals panel affirmed the summary dismissal of petitioner's employment discrimination case.

Despite numerous factual disputes about Vasilopulos' prior, multiple and continuing acts of racism and reprimands by CBS with obvious ineffectiveness, his recalcitrance about sensitivity training, his refusal to comply with CBS' demands for an apology to petitioner and the obvious ineffectiveness of CBS' other remedial actions against him, all three courts found that CBS acted promptly to investigate and reprimand Vasilopulos, thus, "correcting" the environment that petitioner would have had to endure when and if he returned to work. In effect, the lower courts held that the speed of CBS' response and reprimand trumped petitioner's establishment of a jury issue on his hostile-environment and constructive-discharge claims, both arising out of petitioner's fear of being killed by Vasilopulos.

Six months later, CBS advised petitioner that his medical leave was about to terminate, pursuant to company rules, and that he could come back to work on a different shift than Vasilopulos'. Knowing that being assigned to a different shift would jeopardize both his ability to cover important sports events and his tenure as

union steward, petitioner declined to return to work. He was then fired, complied with applicable administrative procedures and filed his claim against WBBM-TV/CBS for employment discrimination.

REASONS FOR GRANTING THE WRIT

A company's "quick" investigation of a race-based death threat by a co-worker should not be enough to justify summary disposition in the company's favor in a racial discrimination case in which the plaintiff has established a *prima facie* case of hostile work environment. Petitioner's harassing co-worker's past and post-event conduct showed that a mere reprimand would not stop his racist behaviors. CBS' shift-switching "accommodation" to the petitioner was not sufficient to protect his job and union status and was, thus, adverse. Nor was the shift-switching proposal sufficient to protect him from continued racial harassment and hostile work environment created by Vasilopulos in the form of death threats. Nonetheless, Vasilopulos remains in his job, while petitioner was fired; and three courts have precluded petitioner from his day in court. The purposes of Title VII should not be so easily thwarted.

This "trumping" law, which pervades the Seventh Circuit's recent employment discrimination opinions, should be overruled as inconsistent with 42 U.S.C. § 2000e. This Court held, in two recent sexual harassment cases, that employers have to establish by a preponderance of the evidence that any remedial employment

actions were "reasonable" and that the employee "unreasonably" failed to take advantage of the preventative or correctional opportunities offered by the employer. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S.Ct. 2257, 2270-71 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275, 2292-94 (1998). Although most district courts apparently feel comfortable disposing of the fact-laden issue of the effectiveness of employers' remedial efforts, other Circuits have found the issue of the efficacy of an employer's remedial actions to racial harassment to rise to the level of fact issue to be decided by a jury. *See, e.g., Reynolds v. CXS Transportation, Inc.*, 115 F.3d 850 (11th Cir. 1997), *cert. granted, vacated in accord with Burlington Industries, Inc.* (*op. cit.*) and *Faragher* (*op. cit.*), 524 U.S. 947, 118 S.Ct. 2364 (1998).

CONCLUSION

For all the reasons stated above, this Court should grant the writ of *certiorari* and vacate the judgment of the Court of the Appeals for the Seventh Circuit in light of *Burlington Industries, Inc.* and *Faragher*.

Respectfully submitted,
ROBERT S. TUTMAN, *pro se*
1600 South Union
Chicago, IL 60616
(312) 738-2121

APPENDIX A

Robert TUTMAN, Plaintiff-Appellant,

v.

WBBM-TV, Inc./CBS, Inc., Defendant-Appellee.

No. 99-2366.

United States Court of Appeals, Seventh Circuit.

Argued Nov. 30, 1999.

Decided April 20, 2000.

Yvonne Owens (argued), Owens & Associates, Robert Tutman, Chicago, IL, for Plaintiff-Appellant.

Debbie L. Berman (argued), Jenner & Block, Chicago, IL, for Defendant-Appellee.

Before MANION, KANNE and ROVNER, Circuit Judges.

KANNE, Circuit Judge.

CBS producer Robert Vasilopulos testified that "it was simply a joke" when he told Robert Tutman, an African-American CBS cameraman, about a comedic movie called *Niggers with Hats* and parroted a phrase from the movie by telling Tutman to "[g]et the fuck out of the office before I pop a cap in your ass." Tutman, however, viewed the comment as a serious death threat and lodged a formal harassment complaint with their employer WBBM-TV, Inc./CBS, Inc. ("CBS"). When CBS responded by punishing Vasilopulos and promising to separate Vasilopulos from Tutman at work, Tutman

remained dissatisfied and eventually sued CBS under Title VII of the Civil Rights Act, 42 U.S.C. §§ 2000e to 2000e-17. The district court granted summary judgment for CBS on the hostile work environment and constructive discharge claims, and Tutman appealed. We affirm summary judgment because CBS took prompt and appropriate remedial action to prevent further harassment and Tutman cannot establish constructive discharge based on the incident with Vasilopulos.

I. History

During the afternoon of Friday May 19, 1995, Tutman was conversing with sportscaster Tim Weigel in the WBBM-TV sports office when CBS co-worker Vasilopulos strolled into the office and said twice to Tutman, "Get the fuck out of the office before I pop a cap in your ass." According to Tutman, Vasilopulos began prancing around, derisively caricaturing African-Americans. Surprised by Vasilopulos's outburst, Tutman responded that the correct phrase was "bust a cap," not "pop a cap."[1] Vasilopulos asked whether Tutman had seen a movie entitled *Niggers with Hats*. Tutman answered that movies like *Niggers with Hats* were profitable and that Vasilopulos should make a similar movie with Tutman's help. After two minutes, both men departed the sports office.

---

[1] The parties agree that "bust a cap" and "pop a cap" means "to shoot" in gang parlance, but CBS maintains that Vasilopulos did not intend his remark as a death threat. Vasilopulos and Tutman appear to have been referring to the film *Fear of a Black Hat* mistakenly as *Niggers with Hats*.

However, Tutman later would testify that he interpreted Vasilopulos's outburst as a racially-motivated death threat and was quite shaken by Vasilopulos's histrionics. After leaving the sports office, he visited his supervisor Andrea Jenkins and told her about Vasilopulos's bizarre behavior. Jenkins assured him that he had done well to notify her and that she would investigate his complaint. Tutman also called D.E. Simmons, an outside consultant retained by CBS to advise on workplace concerns, and told him about Vasilopulos. Simmons then contacted Jenkins who asked Simmons to meet with her at the office forthwith. The pair discussed the situation, then immediately reported Tutman's complaint to News Director John Lansing. Lansing investigated further by speaking to Weigel and Vasilopulos that night about the incident.

On Monday May 22, 1995, Tutman telephoned CBS that he would not come to the station for work because of the incident with Vasilopulos the previous Friday. CBS gave Tutman his work assignment over the telephone, but Tutman did venture to the station that afternoon to meet with General Manager Robert McGann about his complaint. Jenkins and Lansing then briefed McGann about the results of their investigation thus far.

On Tuesday, McGann, Jenkins, Lansing, Simmons and Vasilopulos met to discuss Vasilopulos's version of events. Afterward, McGann informed the CBS human resources department about Vasilopulos's conduct and Tutman's complaint. On Friday, one week after the incident between Vasilopulos and Tutman, CBS's Director of Policy and Administration Sandra Spangenberg arrived

from CBS head quarters in New York to investigate first-hand. After interviewing Tutman, Vasilopulos and other witnesses, Spangenberg told Tutman that his allegation was serious and Vasilopulos's obnoxious behavior would not be tolerated at CBS. Spangenberg told both Vasilopulos and Tutman that Vasilopulos would be punished.

Based on Spangenberg's recommendations, CBS found that Vasilopulos posed no physical threat to Tutman but had been grossly inappropriate. CBS imposed a tripartite punishment on Vasilopulos: (1) a written warning placed in his personnel record making clear that future misconduct would lead to more serious discipline; (2) mandatory participation in a three-day interpersonal skills workshop aimed at promoting better workplace relationships; (3) Vasilopulos was required to apologize to Tutman. In addition, CBS re-circulated its anti-discrimination and fair employment policies to all employees. CBS previously had disciplined Vasilopulos with letters of reprimand for yelling "get the fuck out of my office" at producer Howard Dorsey and for using profanity in the presence of editor Debra Segal. However, at the time, Vasilopulos's personnel file contained no previous harassment complaints or disciplinary actions against him. Later, union official Jessica Logan would testify that Vasilopulos had disparaged CBS camera technician Morris Jones "as a nigger" in June 1995, a month after CBS's investigation of Vasilopulos's harassment of Tutman, but Jones did not bring a formal charge against Vasilopulos.

Predictably, Vasilopulos was unenthusiastic about his punishment. Vasilopulos balked at apologizing to Tutman

but understood that CBS was taking Tutman's complaint "very seriously" and would terminate him if he did not comply. With continued insistence by CBS, Vasilopulos wrote a June 2, 1995, letter addressed to "whom it may concern," explaining noncommitally that he regretted "that comments exchanged in a joking manner with Robert Tutman, on May 19, 1995, were misinterpreted." Vasilopulos also complained about attending the interpersonal skills workshop taught by Simmons, and CBS allowed Vasilopulos instead to attend an alternative three-day sensitivity seminar from August 23 to August 25, 1995. Vasilopulos managed to leave the final day of the program a few hours early.

Despite CBS's response, Tutman refused to work because he felt "unsafe." CBS told Tutman that his assignments could be given by telephone and that he and Vasilopulos could be given staggered shifts to ensure that he would not encounter Vasilopulos at work. Nonetheless, CBS maintained that Tutman had to report for work, and when Tutman remained intransigent, CBS placed Tutman on a paid medical leave of absence. By his admission, Tutman was happy to collect salary without working and did not object. However, CBS's employment policy limited medical leave to six months, and this edict had been strictly enforced without exception during the previous ten years. As the expiration of Tutman's leave drew imminent, Tutman insisted on additional paid leave so that he could "get back in shape" but failed to provide a note from his doctor verifying that extended leave was medically necessary. Indeed, Tutman admits that he had not sustained a serious illness, and his doctors said that there was no reason Tutman could not return to work. As

a result, CBS considered Tutman "voluntarily resigned" when his six-month medical leave lapsed on November 22, 1995.

Tutman filed a charge of discrimination with the Illinois Department of Human Rights and the Equal Employment Opportunity Commission that day. On July 19, 1996, Tutman filed suit against CBS in district court alleging retaliation, racially hostile work environment and constructive discharge under Title VII of the Civil Rights Act. The district court referred the case to Magistrate Judge Morton Denlow who recommended that the district court grant summary judgment for CBS on all Tutman's claims. On April 29, 1999, the district court adopted the magistrate's recommendations and granted summary judgment for CBS on all Tutman's claims. Tutman appeals summary judgment on his hostile work environment and constructive discharge claims.

II. Analysis

We review *de novo* the district court's grant of summary judgment, drawing our own conclusions of law and fact from the record before us. *See Haefling v. United Parcel Serv.*, 169 F.3d 494, 497 (7th Cir.1999). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In determining whether a genuine issue of material fact exists, we construe all facts

in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

A. Hostile Work Environment

Tutman's central claim before the district court was that he suffered a racially hostile work environment, based on the Vasilopulos incident, in violation of Title VII of the Civil Rights Act. For workplace conduct to constitute a hostile work environment actionable under Title VII, the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the plaintiff's] employment and create an abusive environment.' " *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) (citation omitted). However, an employer is not strictly liable under Title VII for sexual harassment perpetrated by its employees. *See Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 320 (7th Cir.1992). In hostile work environment cases, the employer can avoid liability for its employees' harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring. *See Saxton v. American Tel. & Telegraph Co.*, 10 F.3d 526, 535 (7th Cir.1993). The district court found that Tutman had established a genuine issue of material fact whether the Vasilopulos incident created a hostile work environment, but granted summary judgment for CBS because it found that CBS had taken prompt, effective remedial action in response to the incident. We do not decide whether a hostile work environment existed

because the question whether CBS took prompt and effective remedial action is dispositive here.

CBS responded promptly to Tutman's harassment complaint. CBS began investigating Tutman's allegation on the day of the incident, and CBS's general manager interviewed both Tutman and Vasilopulos on the next work day. Within two weeks, CBS had completed its investigation and sanctioned Vasilopulos by issuing him a letter of reprimand, sending him to sensitivity training and commanding him to apologize to Tutman. When Tutman would not return to work, CBS offered to arrange his and Vasilopulos's work schedules so that they would have no contact with each other at work.

Tutman argues that CBS's response was insufficiently punitive given the severity of Vasilopulos's conduct on May 19, 1995. However, the question is not whether the punishment was proportionate to Vasilopulos's offense but whether CBS responded with appropriate remedial action reasonably likely under the circumstances to prevent the conduct from recurring. *See Saxton,* 10 F.3d at 535. By punishing Vasilopulos and promising to segregate Vasilopulos from Tutman at work, CBS made it distinctly improbable that Vasilopulos would further harass Tutman because the two men would have such limited contact, if any, with each other at work. In *Saxton,* the employer effectively responded to the plaintiff's report of sexual harassment by transferring the harasser to a different department because the transfer "served to terminate all contact between [the harasser] and [the plaintiff] and bring a definitive end to any harassment." *Saxton,* 10 F.3d at 536. Similarly, in *Savino v. C.P. Hall Co.,* 199 F.3d 925, 933 (7th Cir.1999), the employer's relocation of the

harasser to a different floor than the plaintiff, in response to her harassment complaint, constituted effective remedial action likely to prevent recurrence of harassment. Likewise here, separating Vasilopulos and Tutman made it quite unlikely that Vasilopulos would harass Tutman again.

Of course, if separating Vasilopulos and Tutman at work would have disadvantaged Tutman, CBS's response would have been inadequate because remedial action that makes the victim worse off is ineffective *per se*. *See Guess v. Bethlehem Steel Corp.*, 913 F.2d 463, 465 (7th Cir.1990). However, Tutman has not established that he would have been injured by CBS's proposed response. CBS has several sports producers other than Vasilopulos, so Tutman would not have been precluded from working sports assignments. Tutman also introduced no evidence that rearranging his work schedule would have forced him to relinquish his union stewardship.

In addition to dissociating Vasilopulos from Tutman, CBS warned Vasilopulos sternly that CBS would not tolerate further harassment of co-workers. CBS reprimanded Vasilopulos, sent him to sensitivity training and ordered him to apologize to Tutman. Vasilopulos boorishly refused to attend the assigned sensitivity training seminar before acquiescing to a different program, from which he arranged to exit early. Vasilopulos also resisted apologizing to Tutman and ultimately penned an unconvincing, three-sentence missive only after continued insistence by CBS management. We sympathize with Tutman's frustration over Vasilopulos's recalcitrance, but Title VII does not require that CBS punish Vasilopulos commensurately to his conduct. The key here is that CBS

responded promptly with remedial action reasonably calculated to end Vasilopulos's harassment of Tutman by making clear to Vasilopulos that further harassment would result in termination and credibly promising Tutman that he would have no contact with Vasilopulos at work.

Alternatively, Tutman offers the novel claim that CBS is liable under Title VII for its failure to prevent Vasilopulos from racially harassing him despite prior indications that made harassment foreseeable. Namely, Tutman points to other instances of verbal abuse by Vasilopulos – incidents of yelling at CBS employees Howard Dorsey, Debra Segal and Morris Jones. Without deciding the viability of a Title VII claim for failure to prevent foreseeable workplace harassment, we find that CBS could not be reasonably expected to have prevented racial harassment here. Tutman alleges only a single racial harassment incident – Vasilopulos allegedly called Jones a "nigger" – of which CBS might have been aware, and that incident occurred in June 1995, after Vasilopulos's harassment of Tutman and Tutman's departure from CBS. Under these facts, CBS was not forewarned before May 19, 1995, that it should have done more to prevent Vasilopulos from engaging in racial harassment.

B. Constructive Discharge

To establish a claim for constructive discharge under Title VII, a plaintiff must prove that his working conditions were so intolerable as a result of unlawful discrimination that a reasonable person would be forced into

involuntary resignation. *See Vitug v. Multistate Tax Comm'n*, 88 F.3d 506, 517 (7th Cir.1996). Working conditions for constructive discharge must be even more egregious than the high standard for hostile work environment because "in the 'ordinary' case, an employee is expected to remain employed while seeking redress." *See Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 886 (7th Cir.1998).

Tutman refused to return to work after Vasilopulos harassed him, but a reasonable employee would not have found work conditions at CBS to be so intolerable that he would have to quit his job. In fact, Tutman did not claim at the time that he could not return to work after his medical leave expired. Instead, despite the absence of medical corroboration, Tutman requested extended leave to get back into shape. Aside from Tutman's bare assertions, there is little to suggest that Tutman's working conditions would have been so objectively intolerable based on the lone incident with Vasilopulos. In cases finding constructive discharge, the plaintiffs suffered from much more severe and sustained harassment. *See, e.g., Snider v. Consolidation Coal Co.*, 973 F.2d 555, 558 (7th Cir.1992); *Taylor v. Western & S. Life Ins. Co.*, 966 F.2d 1188, 1191 (7th Cir.1992); *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 534 (10th Cir.1998). In *Taylor*, we found constructive discharge when the plaintiffs' boss constantly peppered the plaintiffs with racist comments, brandished a pistol and held it to one plaintiff's head. *Taylor*, 966 F.2d at 1191. In *Brooms v. Regal Tube Co.*, 881 F.2d 412, 417, 423 (7th Cir.1989), the plaintiff established constructive discharge where "repeated instances of grossly offensive conduct and commentary" culminated with an incident during

which a co-worker showed the plaintiff a racist pornographic photograph, told her that she was hired to perform the task depicted in the photograph, grabbed the plaintiff and threatened to kill her. A credible death threat that signals grave danger to the plaintiff's bodily integrity, as in *Taylor* and *Brooms*, can constitute grounds for finding constructive discharge, but the harassment suffered by Tutman at Vasilopulos's hands falls well short of this standard.

A reasonable person would not have feared Vasilopulos as a result of his single oblique threat, even construing all reasonable inferences in favor of Tutman, such that he would feel forced to resign. *See, e.g., Drake*, 134 F.3d at 887; *Rabinovitz v. Pena*, 89 F.3d 482, 489 (7th Cir.1996); *Saxton*, 10 F.3d at 537. In *Simpson v. Borg-Warner Automotive, Inc.*, 196 F.3d 873, 877-78 (7th Cir.1999), a co-worker's comment that "someone should take a dish and knock [the plaintiff] upside the head" did not establish constructive discharge. Likewise, in *Lindale v. Tokheim Corp.*, 145 F.3d 953, 956 (7th Cir.1998), "boorish behavior" by co-workers was insufficient for constructive discharge. Vasilopulos's harassment of Tutman was closer to the abuse suffered in these cases than to the vicious harassment in *Brooms* or *Taylor*. Even assuming that Vasilopulos's harassment was so offensive and severe to create a hostile work environment, his conduct was not so egregious as to compel Tutman's resignation and establish constructive discharge.

III. Conclusion

For the foregoing reasons, we AFFIRM the grant of summary judgment.

APPENDIX B

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: April 20, 2000

BEFORE: Honorable DANIEL A. MANION,
Circuit Judge

Honorable MICHAEL S. KANNE,
Circuit Judge

Honorable ILANA DIAMOND ROVNER,
Circuit Judge

No. 99-2366

ROBERT TUTMAN,

Plaintiff-Appellant

v.

WBBM-TV, INCORPORATED/CBS, INCORPORATED,

Defendant-Appellee

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 96 C 4424, Elaine E. Bucklo, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

(1061-110393)

APPENDIX C

United States District Court
Northern District of Illinois
Eastern Division

Robert Tutman — **JUDGMENT IN A CIVIL CASE**

v. — Case Number: 96 C 4424

WBBM-TV/CBS, Inc.

❒ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

■ Decision by Court. This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that defendant's motion for summary judgment on all claims is granted and judgment is entered in favor of defendant, WBBM-TV/CBS, Inc. and against plaintiff, Robert Tutman.

Michael W. Dobbins,
Clerk of Court

/s/ Mathew P. John
Mathew P. John, Deputy Clerk

Date: 4/29/1999

APPENDIX D

Robert TUTMAN, Plaintiff,

v.

WBBM-TV/CBS INC., Defendant.

No. 96 C 4424.

United States District Court,
N.D. Illinois,
Eastern Division.

April 29, 1999.

Yvonne Owens, Owens and Associates, Chicago, IL, for plaintiff.

Linda L. Listrom, Debbie L. Berman, Jenner & Block, Chicago, Illinois, for defendant.

ORDER

BUCKLO, District Judge.

The court has conducted a de novo review of both the factual findings and legal analysis of Magistrate Judge Denlow's Report and Recommendation. The court agrees with Judge Denlow's well reasoned and thorough analysis and therefore adopts the Report dated March 30, 1999 in its entirety. Accordingly, defendant's motion for summary judgment on all claims [69-1] is granted and judgment is entered in favor of defendant, CBS and against plaintiff. Any pending motion in this case is terminated as moot. Status hearing set for 4/30/99 is vacated.

REPORT AND RECOMMENDATION

MORTON DENLOW, United States Magistrate Judge.

Robert Tutman ("Plaintiff" or "Tutman") instituted this action against WBBM-TV/CBS Inc. ("Defendant" or "CBS") and an employee of Defendant, Robert Vasilopulos ("Vasilopulos"). Counts I and II involved state law tort claims directed at Vasilopulos which were previously dismissed. Count III is directed solely at Defendant and charges it with violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e. Count III includes three claims: a retaliation claim, a hostile work environment claim, and a constructive discharge claim. Defendant now brings a motion for summary judgment on Count III arguing that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. For the following reasons the Court recommends that Defendant's motion for summary judgment be granted because the facts viewed in the light most favorable to the Plaintiff demonstrate that the Defendant did not violate Title VII.

I. Factual Background

The following facts are undisputed unless indicated otherwise. Plaintiff Robert Tutman ("Plaintiff") was an employee of CBS through November 22, 1995. (Def.'s Local Rule 12(M) Statement of Undisputed Facts ("Def.'s 12(M)") ¶ 5.) He was assigned to WBBM-TV as a cameraman. *Id.* Tutman's direct supervisor was Kevin Yokley who reported to Andrea Jenkins. (Def.'s 12(M) ¶¶ 6-7.) Tutman also reported to Jenkins. (Def.'s 12(M) ¶ 8.)

Vasilopulos was employed by CBS as a sports producer at WBBM-TV. (Def.'s 12(M) ¶ 9.)

A. The Incident

On Friday, May 19, 1995, Tutman was in the WBBM-TV sports office talking to sportscaster, Tim Weigel. (Def.'s 12(M) ¶ 13.) While Tutman was in the office, Vasilopulos walked in and said to Tutman, "Get the fuck out of the office before I pop a cap in you're ass." (Def.'s 12(M) ¶ 16.) Tutman responded to Vasilopulos that the phrase was "bust a cap" not "pop a cap." (Def.'s 12(M) ¶ 17.) Vasilopulos then asked Tutman if he had ever seen a movie called "Niggers With Hats." (Def.'s 12(M) ¶ 18.) Tutman stated that those types of movies make a lot of money and Tutman would help Vasilopulos make such a movie. (Def.'s 12(M) ¶¶ 19-20.) Tutman perceived Vasilopulos's statements and actions to be a serious threat to Tutman's life made on account of Tutman's race. (Pl.'s Modified Local Rule 12(N) Response to Defendant's Local Rule 12(M) Statement of Material Facts ("Pl.'s 12(N) Response") ¶ 21.) A number of WBBM-TV employees witnessed the exchange. (Def.'s 12(M) ¶ 23.)

B. The Investigation

Following the exchange, both Tutman and Vasilopulos left the sports office. (Def.'s 12(M) ¶ 24.) Tutman went directly to Jenkins and informed her of the incident. (Def.'s 12(M) ¶¶ 7-9, 25.) Tutman left the station shortly thereafter to go home. (Def.'s 12(M) ¶ 28.) On his way home, Tutman called D.E. Simmons, a consultant hired by CBS to address employees' workplace concerns,

to inform Simmons of the incident as well. (Def.'s 12(M) ¶¶ 29-31.) After talking to Tutman, Simmons phoned Jenkins and the two arranged to meet that night to discuss the incident. (Def.'s 12(M) ¶¶ 35-36.) After their discussion, the two informed John Lansing, the news director, of Tutman's concerns. (Def.'s 12(M) ¶¶ 27, 38.) Lansing questioned both Weigel and Vasilopulos about the incident. (Def.'s 12(M) ¶¶ 39-40.)

The following Monday, Tutman called CBS to express that he was not comfortable coming to the station because the incident with Vasilopulos had not been resolved. (Def.'s 12(M) ¶¶ 42.) CBS accommodated Tutman by giving him his assignments over the phone. (Def.'s 12(M) ¶¶ 43.) At the end of his shift Tutman requested and attended a meeting with Robert McGann, the general manager, to inform McGann of the incident. (Def.'s 12(M) ¶¶ 44-46.) Following that meeting, McGann met with Jenkins and Lansing. (Def.'s 12(M) ¶ 48.) McGann initiated his own investigation into the incident which began with a meeting with Vasilopulos. (Def.'s 12(M) ¶¶ 51-52.) McGann's goal for this meeting was to communicate to Vasilopulos that CBS was taking Tutman's allegations seriously and to give Vasilopulos a chance to explain his view of what had occurred. (Def.'s 12(M) ¶ 53.) McGann also informed CBS's human resources department of the incident and it was determined that that department would continue the investigation. (Def.'s 12(M) ¶¶ 56-57.) In addition, CBS's Director of Policy and Administration, Sandra Spangenberg, traveled from New York to conduct an investigation. (Def.'s 12(M) ¶ 58.) After interviewing Tutman, Vasilopulos, and other witnesses, Spangenberg

recommended giving Vasilopulos a written warning. (Def.'s 12(M) ¶¶ 59, 61.)

C. CBS's Disciplining of Vasilopulos

At the conclusion of these investigations, CBS determined that Vasilopulos did not pose a physical threat to Tutman but, because his conduct had been inappropriate, CBS believed that Vasilopulos should be disciplined. (Def.'s 12(M) ¶¶ 66-67.) One possible course of action that CBS explored was terminating Vasilopulos. (Def.'s 12(M) ¶¶ 68, 73.) The parties dispute whether CBS policy mandated terminating Vasilopulos. (See Def.'s 12(M) ¶¶ 68-73; Pl.'s 12(N) Response ¶¶ 68-73.) CBS policy relating to the incident is as follows.

> CBS will not tolerate any form of harassment on account of race, color, national origin, religion, sex, age, sexual orientation. . . . The Company will investigate any issue as it arises and will take appropriate action. Any employee who engages in such harassment will be subject to discipline, up to and including termination.

(Pl.'s Ex. 5, CBS Policy, General, Fair Employment Practices.)

> The following categories are examples of conduct which may be grounds for immediate discharge. . . . Each situation is to be judged on a case-by-case basis. . . .
>
> *Misconduct*
>
> Conduct which is adverse to the safety and welfare of CBS or its employees, including, but not limited to, any act of violence to property or person. . . . or any behavior, which in the sole

> discretion of CBS, endangers CBS' employees, premises, or property or presents a threat of such danger. . . .

(Pl.'s Ex. 5, CBS Policy, Discipline and Termination, *Misconduct*.) After its investigation, CBS concluded that Vasilopulos's conduct did not fall within the *Misconduct* category and that terminating Vasilopulos was not warranted because Vasilopulos had not intended for his comments to be threatening. (Def.'s 12(M) ¶¶ 68, 73.)

CBS decided on a three-part response to Vasilopulos's conduct. (Def.'s 12(M) ¶ 74.) First, CBS gave Vasilopulos a written warning and placed a copy in Vasilopulos's personnel file. (Def.'s 12(M) ¶¶ 75, 77.) The warning emphasized that Vasilopulos's conduct was inappropriate even though Vasilopulos did not intend for Tutman to feel threatened. The letter also stated that any further incidents of this type would result in serious consequences, including possible termination. (Def.'s 12(M) ¶ 76.) Second, CBS sent Vasilopulos to a three-day Interpersonal Skills Workshop which focused on promoting better relationships in the workplace. (Def.'s 12(M) ¶¶ 78-79.) Finally, CBS required Vasilopulos to apologize to Tutman. (Def.'s 12(M) ¶¶ 80.) While Vasilopulos prepared a letter which was sent to Tutman, (Def.'s 12(M) ¶¶ 84-86), the parties dispute whether the letter constitutes an apology, (Pl.'s 12(N) Response ¶ 84). CBS also recirculated its anti-discrimination and fair employment policies to all WBBM-TV employees. (Def.'s 12(M) ¶ 87.)

D. Tutman Placed on Medical Leave

Tutman worked on May 22, 1995 but refused to return to work after that on the grounds that he still felt unsafe at work. (Def.'s 12(M) ¶ 88.) Consequently, CBS placed Tutman on paid medical leave of absence. (Def.'s 12(M) ¶ 89.) Tutman did not request that CBS do so. (Pl.'s Modified Local Rule 12(N) Statement of Additional Facts ("Pl.'s 12(N) Statement") ¶ 20.) While the parties dispute what should have occurred after Tutman spent six months on medical leave of absence, the content of the corporate medical leave policy is not disputed. (See Def.'s 12(M) ¶¶ 89-94; Pl.'s 12(N) Response ¶¶ 89-94.) The content of the policy is as follows. An employee may not remain on a medical leave of absence for more than six months. (Def.'s 12(M) ¶ 90.) At the end of six months, the employee must either return to work if medically able to or apply for long term disability benefits if medically qualified to do so. (Def.'s 12(M) ¶ 91.) An employee who does neither will, at the expiration of six months, be deemed to have voluntarily resigned. (Def.'s 12(M) ¶ 92.)

While Tutman was on leave, members of CBS's management telephoned him in an effort to get him to return to work. (Def.'s 12(M) ¶ 95.) They responded to his fear of Vasilopulos by offering him, if he returned to work, the option of selecting different shifts and receiving his assignments by telephone in order to insure that Tutman would not have contact with Vasilopulos. (Def.'s 12(M) ¶ 96.) Tutman did not return to work at the time that CBS contacted Tutman with these suggestions. He also did not return to work later when CBS contacted him to inform him that he would need to return to work when the six-month medical leave expired. (Def.'s 12(M) ¶¶ 97-98.)

E. Tutman Terminated

Tutman requested an extension of the leave stating that he needed to exercise in order to be in sufficient physical shape to return to work. (Pl.'s Response 12(N) ¶ 100.) CBS informed Tutman that it had denied his request for an extension of his medical leave and that if he failed to return to work on November 22, 1995, the day his six-month leave expired, he would be deemed to have voluntarily resigned. (Def.'s 12(M) ¶ 103.) CBS refused to extend Tutman's medical leave providing as its stated reason CBS's preexisting strict policy to not extend medical leave beyond the six-month allowed time period. (Def.'s 12(M) ¶ 104.) Tutman was deemed to have voluntarily resigned on November 22, 1995 when he failed to return to work and failed to apply for long term disability. (Def.'s 12(M) ¶¶ 108-09.) Thereafter Tutman filed his complaint with the EEOC and instituted this litigation. (Def.'s 12(M) ¶ 111.)

II. Standard of Review

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

When reviewing the record on summary judgment, the court must draw all reasonable inferences in the light most favorable to the nonmoving party. *See Larimer v.*

Dayton Hudson Corp., 137 F.3d 497, 500 (7th Cir.1998). To avert summary judgment, however, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). A dispute about a material fact is genuine only if the evidence presented is such that a reasonable jury could return a verdict for the nonmovant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986).

III. The Motion for Summary Judgment

A. The Retaliation Claim

The Court recommends granting Defendant's motion for summary judgment on the retaliation claim because the evidence does not show that Tutman's request for extended leave was denied in retaliation for his complaint about Vasilopulos. To establish a prima facie case of retaliation, a plaintiff must meet three elements: (1) the plaintiff engaged in protected expression; (2) the plaintiff suffered an adverse action; and (3) there was a causal link between the protected expression and the adverse action. *Drake v. Minnesota Mining and Manufacturing Co.*, 134 F.3d 878, 885 (7th Cir.1998) (citing *McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 796 (7th Cir.1997)). If the plaintiff establishes a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, non-retaliatory reason for the alleged adverse action. *McKenzie v. Illinois Dep't of Transp.*, 92 F.3d 473, 483 (7th Cir.1996). If this is achieved, the burden then shifts back to the plaintiff to show that the defendant's stated reason

for the action is pretextual. *Id.* There is no dispute that Plaintiff has met the first two elements. The retaliation claim turns on the issue of whether there is a fact question regarding the causal link.

1. The Causal Link

CBS is entitled to summary judgment on Tutman's retaliation claim because Tutman has offered insufficient evidence to make out a prima facie retaliation claim. Tutman has failed to establish a causal link between the protected expression and the adverse action. In order to establish the requisite causal link, a plaintiff must prove that the defendant would not have taken the adverse action but for the plaintiff's protected expression. *McKenzie,* 92 F.3d at 483. This Tutman has failed to do. Tutman has introduced no evidence to show that the adverse action CBS took was caused by Tutman's earlier complaints about Vasilopulos. Rather the evidence is clear that Plaintiff was terminated because he failed to return to work following the end of his six month medical leave.

Plaintiff's allegations regarding a causal link between Plaintiff's complaint about Vasilopulos and Plaintiff's deemed resignation are limited to the following paragraph:

> Mr. Tutman notified CBS of his intention to file a Charge of Discrimination by correspondence dated October 20, 1995. CBS met with Mr. Tutman and his attorneys on November 13, 1995. During this meeting, Mr. Tutman's attorneys requested an extension of the medical leave of absence to Mr. Mark Engstrom. Four days after

> the meeting, Mr. Mark Engstrom denied Mr. Tutman's request for extension of medical leave of absence.

(Pl.'s 12(N) Response ¶ 104 (citations omitted).) The most that Tutman shows is that CBS knew of his complaints at the time that it took the adverse action. However, knowledge is insufficient to establish a causal link. *See Gibson v. Old Town Trolley Tours*, 160 F.3d 177, 182 (4th Cir.1998) (holding that judgment as a matter of law was proper when the plaintiff "did not present any evidence that [the defendant] was motivated by the EEOC complaint. Knowledge is necessary to establish causation, but it is not sufficient."). In addition, the mere occurrence of the adverse action after the protected expression is insufficient to support a presumption of causation. *Bermudez v. TRC Holdings, Inc.*, 138 F.3d 1176, 1179 (7th Cir.1998) ("Post hoc ergo propter hoc [After this hence on account of this] is not enough to support a finding of retaliation."). As a result, in that Plaintiff has come forward with no evidence to establish a causal link, summary judgment in favor of Defendant is appropriate on the retaliation claim.

2. The Reason for the Adverse Action as Pretext

Even if Tutman were able to make out a prima facie retaliation claim, CBS is entitled to summary judgment on Tutman's retaliation claim because Tutman has offered no evidence to show that CBS's reason for not extending Tutman's medical leave was pretext. CBS's stated reason for not extending the medical leave was that CBS's policy

does not allow medical leave to be extended beyond six months and no exceptions are made to this limitation. The *McKenzie* case is directly on point. 92 F.3d 473. In that case the adverse action suffered by the plaintiff was her employer refusing to allow her to leave the premises during her breaks. *Id.* at 484. However, the employer explained that it was the company's policy that no employee was allowed to leave during break times. *Id.* The Seventh Circuit stated that, even assuming that the plaintiff had established a prima facie case of retaliation, she failed to present any evidence tending to disprove that the break policy applied to all employees. *Id.* Because the plaintiff was unable to prove that the stated explanation for the adverse action was pretext, the Seventh Circuit affirmed the grant of summary judgment against her on the retaliation claim. *Id.*

In the present case, Tutman also provided no evidence to cast doubt on the stated reason given by CBS for not extending his medical leave. In both the present case and *McKenzie*, the employer stated that the reason for the adverse action was adherence to policy. Tutman was unable to give examples of other employees for whom an exception to the leave policy was made. (See Pl.'s 12(N) Response ¶ 105.) Consequently, in the present case, as in *McKenzie*, Plaintiff has failed to present any evidence tending to cast doubt on the testimony that the policy applied to all employees. As a result, Plaintiff cannot maintain a cause of action for retaliation.

B. The Hostile Work Environment Claim

The Court also recommends granting Defendant's motion for summary judgment on the hostile work environment claim. Although the Court concludes that Plaintiff did create a genuine issue of material fact as to the existence of a hostile work environment, the Court concludes that CBS's response to Tutman's complaint was prompt and appropriate. In order to establish a claim of hostile work environment, a plaintiff must meet three elements. First, he must show that he subjectively believed that the alleged wrongdoer's conduct created a racially hostile environment. *McKenzie*, 92 F.3d at 480. Second, he must show that the alleged wrongdoer's conduct objectively created a racially hostile environment. *Id.* Finally, he must show that the defendant knew, or should have known, of the alleged wrongdoer's conduct and the defendant failed to take prompt and appropriate remedial action in response to that conduct. *Id.* (citing *Brooms v. Regal Tube Co.*, 881 F.2d 412, 421 (7th Cir.1989)).

> If an employer takes reasonable steps to discover and rectify the harassment of its employees, however, it has discharged its legal duty. *Baskerville v. Culligan Int'l Co.*, 50 F.3d 428, 431 (7th Cir.1995). "An employer's response to alleged instances of employee harassment must be reasonably calculated to prevent further harassment under the particular facts and circumstances of the case at the time the allegations are made." *Brooms*, 881 F.2d at 421. We are not to focus "solely upon whether the remedial activity ultimately succeeded, but instead should determine whether the employer's total response was reasonable under the circumstances as then existed." *Id.* The reasonableness

> of an employer's response depends, in part, on the gravity of the harassment alleged. *Baskerville,* 50 F.3d at 432.

McKenzie, 92 F.3d at 480.

1. The Single, Isolated Incident of Harassment

Tutman has offered sufficient evidence of harassment to create a genuine issue of material fact as to the existence of a hostile work environment. The determination of a hostile work environment can only be made by evaluating all of the circumstances which include the frequency and severity of the discriminatory conduct, whether the conduct is physically threatening or humiliating, and whether it is an unreasonable interference with the victim's work performance. *Harris v. Forklift Systems, Inc.,* 510 U.S. 17, 23, 114 S.Ct. 367, 371, 126 L.Ed.2d 295 (1993).

Defendant argues that, as a matter of law, a single incident of harassment is insufficient to support a hostile work environment claim. Seventh Circuit caselaw demonstrates otherwise. The Seventh Circuit has stated that a single act can be sufficient to support a hostile work environment claim. *King v. Board of Regents,* 898 F.2d 533, 537 (7th Cir.1990). While it is true that in *King* the Seventh Circuit pointed out that "[a]lthough a single act can be enough, generally, repeated incidents create a stronger claim of hostile environment, with the strength of the claim depending on the number of incidents and the intensity of each incident," *id.,* the Seventh Circuit has specifically criticized the use of any bright line rule

requiring a minimum number of incidents to support a hostile work environment claim as a matter of law.

> The determination of defendant's liability "must be made on a case-by-case basis after considering the totality of the circumstances." *Nazaire*, 807 F.2d at 1380-1381. Within the totality of circumstances, there is neither a threshold "magic number" of harassing incidents that gives rise, without more, to liability as a matter of law nor a number of incidents below which a plaintiff fails as a matter of law to state a claim. *Daniels*, 937 F.2d at 1273-1274.

Rodgers v. Western-Southern Life Ins. Co., 12 F.3d 668, 675 (7th Cir.1993). Consequently, the Court refuses to conclude that one incident is, as a matter of law, insufficient to support a hostile work environment claim.

That conclusion, coupled with the evidence that the incident at issue was especially severe, leads this Court to conclude that Plaintiff has submitted sufficient evidence to create a genuine issue of material fact as to the hostile work environment claim. Courts have pointed out that the racial epithet of "nigger" is particularly offensive. *See Rodgers*, 12 F.3d at 675. In *Rodgers*, the Seventh Circuit stated that the word "nigger" is unambiguously racist and held that its use on even a few occasions affects the terms and conditions of the plaintiff's employment severely enough to support a hostile work environment claim. *Id.* Other courts have also noted the severe impact of the use of the word. *See Bailey v. Binyon*, 583 F.Supp. 923, 927 (N.D.Ill.1984). "The use of the word 'nigger' automatically separates the person addressed from every non-black person; this is discrimination per se." *Id.*

In addition, in the present case, it is undisputed that Vasilopulos not only used the word "nigger" in the exchange with Tutman but Vasilopulos also threatened to kill Tutman. This added physical threat makes the present case distinguishable from cases in which the Seventh Circuit has held that there was no hostile work environment as a matter of law. *See McKenzie v. Illinois Dep't of Transportation*, 92 F.3d 473, 480 (7th Cir.1996) (holding that three sexually suggestive comments over a three month period were not frequent enough nor severe enough to be unreasonable interference with the plaintiff's work environment); *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 885 (7th Cir.1998) (holding that a single offensive, racist comment was not sufficient to establish a hostile work environment). Consequently, the Court concludes that the evidence submitted by Plaintiff creates a genuine issue of material fact as to whether the discriminatory conduct suffered by Plaintiff was so offensive and severe that a single act of it creates a hostile work environment.[1]

---

[1] Plaintiff cited to several additional instances of discriminatory conduct at CBS which the court may properly consider in deciding the motion for summary judgment. The Court concludes that one set of these allegations adds support to Plaintiff's hostile work environment claim. Mr. Tutman testified as to general discriminatory treatment directed at minorities. (Pl.'s 12(N) Statement ¶ 16.) In addition, Mr. Tutman himself allegedly was the target of four or five physical threats. (Pl.'s 12(N) Statement ¶ 17. but cited pages not included in exhibits) Further, there was an additional incident with Vasilopulos in which he told an African-American producer to "get the fuck out of my office." (Pl.'s 12(N) Statement ¶ 23.) Finally, there were allegations of racial harassment being suffered by third parties at CBS including one employee being called a "spic" and another employee being told she was "too dark." (Pl.'s 12(N) Statement ¶ 15.)

2. Response to the Conduct

Even though Tutman was able to demonstrate that Vasilopulos's conduct created a racially hostile work

---

First, the Court finds the allegations regarding general discriminatory treatment are insufficient to provide evidence of a hostile work environment in that Plaintiff has provided no specific details regarding any particular instances of such treatment aside from a list of names and a brief, general description of an adverse action suffered by that person. The Court cannot make any informed assessment as to the severity, frequency, or pervasiveness of these incidents with only these general allegations. It would not even be possible to conclude from these general allegations whether the conduct was actually discriminatory as compared to, for instance, racial slurs which are discriminatory on their face. It is not the Court's place to hold a mini-trial on each one of these incidents. Consequently, this allegation cannot provide the basis for a hostile work environment claim.

Second, regarding the allegations that Tutman himself suffered four or five physical threats, Plaintiff failed to provide details as to the specific instances of threatening conduct nor facts to support the allegation that these were motivated by discrimination. In fact, aside from including these allegations in his statement of facts, Plaintiff did not even include the deposition pages in his exhibit to which he cited. The Court will not presume, without any evidence, that these incidents were discriminatory; thus, the allegations of physical threats provide no evidence to support Tutman's hostile work environment claim.

Finally, as to the racial slurs directed at other employees at CBS and the profanity Vasilopulos directed at an African-American producer, the Court will consider these based on Northern District of Illinois and Seventh Circuit precedents demonstrating that it is permissible for a court to consider harassment of third parties in hostile work environment claims. *See Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 460 (7th Cir.1990) (considering corroborating evidence as to instances of

environment, CBS is entitled to summary judgment on Tutman's hostile work environment claim because the record is clear that as a matter of law CBS took prompt and appropriate remedial action in response to Vasilopulos's conduct. An employer can be held responsible for a hostile work environment only if, when an employee harasses a coworker, the employer knew or had reason to know of the conduct and failed to take appropriate corrective action. *McKenzie*, 92 F.3d at 480. An employer acts unreasonably if the employer unduly delays its response to an incident or if the action the employer does take is not reasonably likely to prevent the conduct from recurring. *Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526, 535 (7th Cir.1993).

---

harassment of other employees); *Valadez v. Uncle Julio's of Illinois, Inc.*, 895 F.Supp. 1008, 1013 (N.D.Ill.1995) (stating that "the court can consider evidence of sexual harassment directed at other employees of the same sex as plaintiff" when determining the existence of a hostile work environment). Consequently, the racial slurs and profanity directed at other minority employees can be considered in the hostile work environment claim. However, even combined with the threat towards Tutman, Tutman has still only provided evidence of four isolated incidents of racial discrimination at CBS. While there is a question as to when Tutman learned of these incidents, these instances do have the potential to provide added corroboration of Plaintiff's claim of a hostile work environment. Consequently, this evidence further supports the Court's conclusion that there is a genuine issue of material fact as to Plaintiff's hostile work environment claim.

a. Appropriateness in General

Plaintiff argues that CBS's response was not appropriate because it did not conduct an adequate investigation. Plaintiff disputes whether there was an actual investigation and alleges that the so-called investigation was in actuality just a series of meetings. However, Plaintiff did not dispute a single paragraph in CBS's statement of facts describing the investigation. (Pl.'s 12(N) Response ¶¶ 35-65.) The investigation included multiple interviews with Vasilopulos, (Def.'s 12(M) ¶¶ 40, 51, 59), interviews with Tutman, (Def.'s 12(M) ¶¶ 44, 59), and interviews with employees who had witnessed the incident, (Def.'s 12(M) ¶ 59). The investigation also included inquiries into the incident by three different individuals, the News Director, the General Manager, and a representative from the New York Human Resources Department. (Def.'s 12(M) ¶¶ 39, 40, 51, 58.) In addition, Plaintiff cites no cases to support his position that this was an inadequate investigation. Consequently, the Court concludes that the investigation was sufficient as a matter of law.

Plaintiff also argues that CBS's response was not appropriate because CBS's policy required that Vasilopulos be terminated. Plaintiff argues that CBS did not have discretion under its policy on how to discipline Vasilopulos. This argument is rejected because the policy on its face provides CBS with discretion. The policy states that

> CBS will not tolerate any form of harassment on account of race, color, national origin, religion, sex, age, sexual orientation. . . . The Company will investigate any issue as it arises and will take appropriate action. Any employee who

> engages in such harassment will be subject to discipline, *up to and including termination.*

(Pl.'s Ex. 5, CBS Policy, General, Fair Employment Practices) (emphasis added).

> The following categories are examples of conduct which *may* be grounds for immediate discharge. . . . Each situation is to be judged on a case-by-case basis. . . .
>
> *Misconduct*
>
> Conduct which is adverse to the safety and welfare of CBS or its employees, including, but not limited to, any act of violence to property or person. . . . or any behavior, which in the sole discretion of CBS, endangers CBS' employees, premises, or property or presents a threat of such danger. . . .

(Pl.'s Ex. 5, CBS Policy, Discipline and Termination) (emphasis added). First, under the policy, harassment does not require immediate termination only discipline, "up to and including termination." Second, the Discipline and Termination section does not mandate termination for the listed categories but only says that it *may* be the result. Third, even if the Discipline and Termination section did require termination, the conduct at issue does not necessarily fall into the *Misconduct* category within the Discipline and Termination section. The conduct at issue could be interpreted one of two ways: (1) Vasilopulos was serious and intended his words to be a threat to kill Tutman or (2) Vasilopulos was merely joking around and never genuinely intended to kill Tutman or for his words to be interpreted as a serious threat to kill Tutman. Consequently, it was open for interpretation as

to whether Vasilopulos's conduct was a genuine threat of violence which fell within the *Misconduct* category. After investigation, CBS concluded that it did not. It was within CBS's discretion to draw that conclusion.

Seventh Circuit case law reinforces the conclusion that CBS's response was appropriate. In *McKenzie v. Illinois Dep't of Transportation*, 92 F.3d 473, 483 (7th Cir.1996), the employer's response to an employee's sexually suggestive remarks to the plaintiff consisted of having a meeting to discuss the complaint, deciding that the employee would have no further contact with the plaintiff, and issuing a memo reiterating the company's sexual harassment policy. *Id.* The Court held that, as a matter of law, the response was a reasonable one given the gravity of the conduct. *Id.* In *Iovin v. Northwestern Memorial Hospital*, 916 F.Supp. 1395, 1411 (N.D.Ill.1996), the employer's response to discriminatory remarks made to the plaintiff consisted of telling the plaintiff that such remarks would not be tolerated, meeting with the offender and warning him that the conduct was inappropriate and must cease immediately, issuing a written warning to the offender which detailed the employer's anti-discrimination policy, and finally moving the plaintiff's workstation away from the offender's. *Id.* The court held that, as a matter of law, this was an appropriate response. *Id.*

CBS's response to the harassment at issue in the present case went farther than the response in either *Iovin or McKenzie*. Not only did CBS issue a warning letter to the wrongdoer as did the employer in *Iovin*, assure that the plaintiff and the wrongdoer would have no further contact as did both the employers in *Iovin* and *McKenzie*, and recirculate its antidiscrimination policy as did the

employer in *McKenzie*, but CBS also sent the wrongdoer to a training session. Thus, even though the gravity of the conduct in all of these cases was comparable, that is, consisting of discriminatory remarks, CBS response went beyond the responses in *McKenzie* and *Iovin*. Thus, based on these precedents, CBS's response in the present case was appropriate as a matter of law.

b. Promptness

The Court must also examine whether CBS's response was sufficiently prompt after Tutman complained of Vasilopulos's conduct. The Court concludes that no question of fact exists on this issue. CBS's response consisted of the following actions within the following time frames. First, after Tutman reported the incident to his supervisor, his supervisor immediately reported it to the News Director. (Def.'s 12(M) ¶ 38.) The News Director began his investigation the very day of the incident. (Def.'s 12(M) ¶¶ 39-40.) The next business day, Tutman reported the incident to the General Manager of the station, who began his own investigation. (Def.'s 12(M) ¶¶ 51-52.) Four days after the incident, the Director of Policy and Administration from the human resources department traveled from New York to also conduct an investigation independent of the others that were occurring. (Def.'s 12(M) ¶ 58.) Finally, before the close of two weeks, CBS had concluded its investigation and determined what course of action it would take in response to the incident. (Def.'s 12(M) ¶¶ 74-84.) Further, two out of three prongs of its response, the letter of reprimand to Vasilopulos and Vasilopulos's letter to Tutman, were also

completed within two weeks of the incident, leaving only Vasilopulos's training to be completed. (Def.'s 12(M) ¶¶ 75, 84-86.)

Under the case law, an investigation and response within two week's time is sufficiently prompt. In *Saxton*, the court concluded as a matter of law that the employer acted with sufficiently promptness when the supervisor began his investigation the day after the plaintiff lodged her formal complaint, the supervisor completed his report two weeks later, and finally the wrongdoer was disciplined within five weeks of the incident. *Saxton*, 10 F.3d at 535. In *McKenzie* the Court held that, as a matter of law, an employer's response was prompt when management met to discuss the complaint and determine a course of response within ten days of the incident being reported. *McKenzie v. Illinois Dep't of Transportation*, 92 F.3d 473, 481 (7th Cir.1996). Consequently, the Court concludes that CBS's present action of investigating the incident, determining its course of action, and reprimanding the offender within two weeks of the incident is sufficiently prompt.

c. Reasonably Likely to Prevent the Conduct from Recurring

The Court also concludes as a matter of law that CBS's investigation and response to the incident was reasonably likely to prevent the conduct from recurring. First, when Tutman reported the incident to Jenkins, Simmons, and McGann, all verbally responded to Tutman in a way that demonstrated that they were taking the allegations seriously. (Def.'s 12(M) ¶¶ 26-27, 33, 47.) Jenkins

told Tutman that he had done the right thing by informing her of the incident and assured him that she would take care of the matter. (Def.'s 12(M) ¶¶ 26-27.) Simmons told Tutman that he had done the right thing by reporting the incident. (Def.'s 12(M) ¶ 33.) Simmons also told Tutman that he would discuss the incident with Jenkins. (Def.'s 12(M) ¶ 34.) McGann told Tutman that he was taking the allegations very seriously and resolving the matter would be McGann's top priority. (Def.'s 12(M) ¶ 47.) Several members of CBS management also informed Vasilopulos that the allegations against him were very serious. (Def.'s 12(M) ¶¶ 41, 55.) Immediately after the incident, three different members of CBS management launched investigations into the occurrence. (Def.'s 12(M) ¶¶ 39-40, 51-52, 58.)

These investigations resulted in a conclusion that although Vasilopulos's behavior was inappropriate, it was not meant to be seriously threatening and Vasilopulos posed no risk of violence to Tutman. (Def.'s 12(M) ¶¶ 66-67.) As a result, there was a three pronged response to Vasilopulos which included a warning letter to Vasilopulos that was placed in his file, sending Vasilopulos to a workshop on workplace relationships, and the letter from Vasilopulos to Tutman. (Def.'s 12(M) ¶¶ 74-80.) CBS additionally took several other steps to prevent the occurrence of similar incidents. CBS put Tutman on paid leave until and even after the situation was resolved. (Def.'s 12(M) ¶ 89.) In addition, CBS recirculated its anti-discrimination policy to all employees at the station. (Def.'s 12(M) ¶ 87.) Finally, CBS saw to it that there would be no contact between Tutman and

Vasilopulos by placing them on different shifts and allowing Tutman to get his assignments without coming into the station. (Def.'s 12(M) ¶ 96.) The Court concludes that this response was reasonably likely to prevent the conduct from recurring.

Plaintiff argues to the contrary. Plaintiff points out that Vasilopulos had prior written reprimands in his file for similar instances in which he raised his voice at other employees and used profanity. Plaintiff posits that the incident between Vasilopulos and Tutman demonstrates that written reprimands neither altered nor modified Vasilopulos's behavior. Consequently, Plaintiff argues that CBS's response to Vasilopulos's treatment of Tutman was not appropriate because CBS had prior notice that a written warning to Vasilopulos was insufficient to prevent such behavior from recurring. Plaintiff, however, misconstrues the standard which requires prevention of likelihood of recurrence.

First, CBS's duty, the requirement of an appropriate response, only requires that the employer insure that the conduct will not likely be repeated between the offender and the plaintiff. The likelihood of recurrence need only be against the initial victim. *See Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526, 535-36 (7th Cir.1993) (holding that transferring the offender to a different department from the plaintiff "was a sufficient safeguard against any recurrence of the harassment"). Thus, CBS did not need to insure that Vasilopulos never again made discriminatory or harassing remarks to any employee at CBS, but only that Vasilopulos did not make discriminatory remarks again to Tutman.

The mere existence of repeat occurrences directed at different victims does not make the discrimination suffered by Plaintiff actionable. "Title VII is not directed against unpleasantness per se but only . . . against discrimination in the conditions of employment." *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1009 (7th Cir.1994). It is true that termination would have prevented repeated discriminatory conduct by Vasilopulos directed at any victim. However, the Court is not a super human resources department. The Court is not here to second guess CBS's hiring and hiring decisions. Vasilopulos certainly does not appear to be a pleasant coworker. He has on more than one occasion treated his coworkers disrespectfully and rudely. However, it is not the Court's job to review every prior incident in Vasilopulos's file, only the conduct directed at Plaintiff. In sum, since CBS's response to the present incident was appropriate and designed to prevent repeat occurrences of discrimination directed at Tutman, it was within CBS's discretion as an employer to choose to retain Vasilopulos.

Second, and perhaps more important, even if the prior reprimand in Vasilopulos's file demonstrated that a written warning was insufficient to prevent repeat occurrences of discriminatory remarks directed at the same victim, CBS took further undisputed steps to insure that Vasilopulos and Tutman would never have to have contact with each other. CBS offered Tutman different shifts from Vasilopulos and the option of receiving his assignments by telephone so Tutman would not have to come into the station. This offer was perfectly sufficient to insure the prevention of repeated discriminatory conduct by Vasilopulos directed at Tutman. Consequently, CBS's

response was designed to prevent Tutman from suffering repeated acts of discrimination by Vasilopulos. In sum, in that Tutman fails to provide any evidence demonstrating that CBS's response to Tutman's complaint was inadequate or inappropriate, Defendant's motion for summary judgment is granted.

C. The Constructive Discharge Claim

Finally, the Court recommends granting Defendant's motion for summary judgment on the constructive discharge claim. To maintain a claim for constructive discharge, a plaintiff must show that his working conditions were so intolerable because of unlawful discrimination, that a reasonable person would have been compelled to resign. *Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 885 (7th Cir.1998). A constructive discharge claim requires the work environment to be an aggravating situation beyond ordinary discrimination. *Rabinovitz v. Pena*, 89 F.3d 482, 489 (7th Cir.1996). In that Tutman failed to meet the high standard required for constructive discharge, *Drake*, 134 F.3d at 886, the Court grants Defendant's motion for summary judgment.

This conclusion is dictated by *Saxton v. American Telephone & Telegraph Co.*, 10 F.3d 526, 535 (7th Cir.1993). In *Saxton*, much like the present case, the employee plaintiff brought a claim as a result of dissatisfaction with the employer's response to discrimination. *Id.* at 530, 535. "Nothing in the record indicates that [the defendant] treated [the plaintiff] so poorly that a reasonable employee in her position would have felt compelled to resign. To the contrary, the evidence suggests that [the

defendant] went out of its way to ensure that [the plaintiff] was not placed in an uncomfortable or embarrassing position while the company investigated her complaint and took remedial measures." *Id.* at 537 "Whatever lingering dissatisfaction [the plaintiff] may have felt regarding the resolution of her complaint or her position at work, her situation cannot reasonably be described as intolerable." *Id.* The plaintiff's evidence did not "support an inference that [her] decision to abandon her job was effectively coerced by [the defendant's actions.]" *Id.* In sum, the court acknowledged that when an employer takes reasonable steps to rectify harassment, the employer cannot be held liable for constructive discharge. *Id.* In that, in the present case, the Court concluded above that CBS took reasonable steps to respond to the incident to Vasilopulos the Court concludes that a reasonable person, in light of such a response, would not feel compelled to resign.

IV. CONCLUSION

Plaintiff has not presented sufficient evidence to create a genuine issue of material fact as to his retaliation claim, his hostile work environment claim, or his constructive discharge claim. **As a result, the Court recommends that Defendant's motion for summary judgment be granted on all claims.**
